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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ and LORA SMITH,
 individually and on behalf of a class of all other
 persons similarly situated,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.;
 K-M INDUSTRIES HOLDING CO., INC.
 ESOP PLAN COMMITTEE; WILLIAM E.
 AND DESIREE B. MOORE REVOCABLE
 TRUST; TRUSTEES OF THE WILLIAM E.
 AND DESIREE B. MOORE REVOCABLE
 TRUST; CIG ESOP PLAN COMMITTEE;
 NORTH STAR TRUST COMPANY;
 DESIREE B. MOORE REVOCABLE TRUST;
 WILLIAM E. MOORE MARITAL TRUST;
 WILLIAM E. MOORE GENERATION-
 SKIPPING TRUST; and DESIREE MOORE,
 BOTH IN HER INDIVIDUAL CAPACITY
 AND AS TRUSTEE OF THE WILLIAM E.
 AND DESIREE B. MOORE REVOCABLE
 TRUST'S SUCCESSOR TRUSTS NAMED
 ABOVE,

Defendants.

Case No. C-06-07339 MJJ

**[PROPOSED] ORDER GRANTING
 PLAINTIFFS' MOTION TO
 COMPEL PRODUCTION OF
 DOCUMENTS**

DISCOVERY MATTER

1 This matter comes before the Court on Plaintiffs' Motion to Compel Production of
2 Documents. Having considered the arguments presented in the parties' papers and at oral
3 argument, and good cause showing, the Motion to Compel is GRANTED.

4 **I. BACKGROUND**

5 Plaintiffs contend that Defendants K-M Industries Holding Co., Inc.; K-M Industries
6 Holding Co., Inc. ESOP Plan Committee; and CIG ESOP Plan Committee ("KM Defendants")
7 improperly withheld the following documents on the ground of attorney-client privilege:

8 Document 2 is a note to file dated October 1, 1998, by Steve Ferrari, the Vice President
9 and CFO of Kelly-Moore Paint Co., Inc. It is described in Defendants' privilege log as "Note of
10 communication with Cheryl Mills, attorney for Kelly-Moore Paint Company re extent of
11 insurance coverage for asbestos claims against Kelly Moore and effect on KMPC share prices;
12 advice sought in connection with providing information to ESOP evaluator." Wasow Dec. Exh.
13 1 at 2.

14 Document 4 is a letter (with facsimile transmittal cover) from Cheryl Mills, an attorney at
15 Pillsbury, Levinson & Mills, to Joseph Cristiano, the CEO of Kelly-Moore Paint Co., Inc., dated
16 December 11, 1998. It is described in the privilege log as "Extent of insurance coverage for
17 asbestos claims against Kelly Moore and effect on KMPC assets; information sought in
18 connection with providing information to ESOP participants and ESOP Trustee." Wasow Dec.
19 Exh. 1 at 2.

20 **II. LEGAL STANDARD**

21 Federal Rule of Civil Procedure 26(b)(1) provides that parties may obtain discovery
22 regarding any matter relevant to the claim or defense of any party. "Relevant information need
23 not be admissible at the trial if the discovery appears reasonably calculated to lead to the
24 discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Where a party fails to make a
25 disclosure, Federal Rule of Civil Procedure 37(a)(2) allows a party to move the court for an order
26 compelling disclosure. "This rule establishes 'a flexible means by which a court may enforce
27 compliance with the Federal discovery procedures through a broad choice of remedies and
28

penalties.’” *Marsh v. County of San Diego*, 2007 WL 3023478 at *2 (S.D. Cal. Oct. 15, 2007) (quoting *B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411, 415 (5th Cir. 1954)).

III. ANALYSIS

a. There Is a Fiduciary Exception to the Attorney-Client Privilege.

An ERISA plan fiduciary may not assert the attorney-client privilege against plan participants with regard to matters of plan administration. *See Geissal v. Moore Med. Group*, 192 F.R.D. 620, 624 (E.D. Mo. 2000) (collecting cases and citing *Mett* approvingly). A plan fiduciary acts on behalf of the plan’s participants and beneficiaries in seeking advice of counsel on matters relating to plan administration. *See Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982). In such instances, the true client is the participant or beneficiary. *United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986). In a sense, therefore, the fiduciary exception is not really an *exception* at all; rather, “it merely reflects the fact that, at least as to advice regarding plan administration, a trustee is not ‘the real client’ and thus never enjoyed the privilege in the first place.” *Mett*, 178 F.3d at 1063. Thus, a fiduciary seeking legal advice in matters of plan administration may not later claim attorney-client privilege as to that communication.

Under *Mett*, communications remain subject to the privilege if they implicate the fiduciary in a personal capacity. 178 F.3d at 1064. In other words, if the fiduciaries obtain the advice of counsel to protect themselves from potential civil or criminal liability in either then-pending or anticipated litigation by plan participants (or the government), the advice is protected from disclosure to plan participants. *Id.* at 1064-66.

Thus, to determine whether the communications at issue are subject to the fiduciary exception, the Court must examine whether the communications addressed matters of plan administration, and whether the communications related to the potential personal liability of the fiduciaries.

b. The Communications Requested by Plaintiffs Are Subject to the Fiduciary Exception to the Attorney-Client Privilege.

1 Documents 2 and 4 fall within the fiduciary exception because they are communications
2 by or to fiduciaries, relate to matters of plan administration – specifically, provision of
3 information to valuers and participants – and do not relate to the personal liability of the
4 fiduciaries.

5 **i. KM Defendants are Fiduciaries of the Plan.**

6 Document 2 was authored by Stephen Ferrari, the Vice President for Finance and CFO of
7 Kelly-Moore Paint Co., Inc. Document 4 was received by Joseph Cristiano, who was the CEO of
8 Kelly-Moore Paint Co. Kelly-Moore Paint Co. is a wholly-owned subsidiary of Defendant K-M
9 Industries Holding Co., Inc (“KMH”). Mr. Cristiano and Mr. Ferrari were Plan fiduciaries by
10 virtue of the fact that they were corporate executives who carried out functions of the entities
11 named as the fiduciaries of the Plan – namely, the K-M entities.

12 ERISA § 3(21)(A) defines a fiduciary as anyone having discretionary authority or control
13 over the management or administration of the Plan. KMH identifies itself as the administrator of
14 the Plan in the Summary Plan Description, and states that “[t]he Plan Administrator’s duties may
15 be delegated to the Plan Committee.” Wasow Dec. Exh. 2 at 3. Further, the Summary Plan
16 Description states that the Plan Committee has discretionary authority to construe the terms of
17 the Plan and make determinations on eligibility for benefits. *Id.* Thus, the K-M entities are
18 fiduciaries of the Plan to the extent that they acted as plan administrators. *See Cunha v. Ward*
19 *Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986) (stating that an employer assumes fiduciary
20 status when it functions in its capacity as plan administrator, citing *Amato v. Western Union Int’l,*
21 *Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)). *See also* Amended Answer of KM Defendants at
22 ¶¶ 9, 11 (admitting that the K-M Defendants have, at relevant times, been named fiduciaries of
23 the Plan). Further, corporate officers who carry out the functions of a committee or entity named
24 as a plan fiduciary are themselves fiduciaries. *Stewart v. Thorpe Holding Co. Profit Sharing*
25 *Plan*, 207 F.3d 1143, 1156 (9th Cir. 2000). *See also Kayes v. Pacific Lumber Co.*, 51 F.3d 1449,
26 1459-61 (9th Cir. 1995) (same).

27 According to KM Defendants’ descriptions of the documents, Ferrari and Cristiano were
28 involved in providing information to the valuation expert, the ESOP participants, and the

1 Trustee; as discussed further below, these are fiduciary functions. Thus, Ferrari and Cristiano
2 were corporate officers who carried out functions of the Plan fiduciary, and communications
3 made or received by them are subject to the fiduciary exception.

4 **ii. The Documents Pertain to Plan Administration.**

5 Documents 2 and 4 relate to fiduciary matters: provision of information to ESOP
6 valuers and Plan participants. Although “matters of plan administration” has been used as a
7 shorthand, the fiduciary exception as fully articulated requires disclosure of matters related to
8 fiduciary functions. As one court put it, “an employer acts as an ERISA fiduciary only in plan
9 management or administration, not in the plan’s design or amendment. The employer’s ability to
10 invoke the attorney-client privilege to resist disclosure sought by plan beneficiaries turns on
11 whether or not the communication concerned a matter as to which the employer owed a fiduciary
12 obligation to the beneficiaries.” *In re Long Island Lighting Co.*, 129 F.3d 268, 271 (2nd Cir.
13 1997).

14 Document 2, by KM Defendants’ description, deals with a fiduciary function: provision
15 of information to an ESOP evaluator. A fiduciary has the duty to provide complete and accurate
16 information to an expert retained to value a company prior to sale of some portion of that
17 company to an ESOP. *See Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996) (holding that a
18 fiduciary who engages in a self-dealing transaction must prove that he fulfilled his duty of care
19 and loyalty and that the ESOP received adequate consideration and, to that end, must “(1)
20 investigate the expert’s qualifications, (2) provide the expert with complete and accurate
21 information, and (3) make certain that reliance on the expert’s advice is reasonably justified
22 under the circumstances”) (citations omitted). Thus, provision of information to a valuator is a
23 “fiduciary function” related to plan management and/or administration, and communications
24 related thereto are not covered by the attorney-client privilege.

25 Document 4 also relates to a fiduciary function: communication with Plan participants.
26 KM Defendants’ description of the document states that it contains information “sought in
27 connection with providing information to ESOP participants.” Communication with plan
28 beneficiaries is a fiduciary function. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996)

1 (“While it may be true that amending or terminating a plan (or a common-law trust) is beyond
 2 the power of a plan administrator (or trustee) – and, therefore, cannot be an act of plan
 3 ‘management’ or ‘administration’ – it does not follow that making statements about the likely
 4 future of the plan is also beyond the scope of plan administration.”). *See also Peralta v.*
 5 *Hispanic Business, Inc.*, 419 F.3d 1064, 1071-72 (9th Cir. 2005) (holding that ERISA’s fiduciary
 6 duty provisions require a plan administrator to provide information to participants beyond that
 7 expressly required in the statute’s reporting and disclosure provisions). Thus, advice of counsel
 8 regarding information to be conveyed to participants is subject to the fiduciary exception to the
 9 attorney-client privilege.

10 **iii. The Requested Communications do not Relate to the Fiduciaries’** 11 **Potential Personal Liability**

12 Finally, the documents at issue are not privileged under *Mett*, because they do not relate
 13 to KM Defendants’ *personal* liability. In *Mett*, the court observed that the documents at issue
 14 were prepared when participants “had begun asking difficult questions regarding the financial
 15 condition of the plans. Trouble was in the air.” 178 F.3d at 1064. Further, “[t]he memoranda
 16 were plainly ‘defensive on the trustees’ part,’ and aimed at advising the trustees ‘how far they
 17 were in peril.’” *Id.* (citations omitted). Here, in contrast, there was no existing or contemplated
 18 litigation by the beneficiaries against the fiduciaries in 1998, when the documents in question
 19 were prepared. Nothing in the description of the documents indicates that they contain advice
 20 about KM Defendants’ personal civil or criminal liability; rather, the documents are about the
 21 extent of the company’s insurance coverage for asbestos claims. Thus, they are not subject to the
 22 attorney-client privilege under *Mett*.

23 **IV. CONCLUSION**

24 For the foregoing reasons, IT IS HEREBY ORDERED THAT within 48 hours of the
 25 filing of this order, Defendants K-M Industries Holding Co., Inc.; K-M Industries Holding Co.,
 26 Inc. ESOP Plan Committee; and CIG ESOP Plan Committee shall produce the documents
 27 identified as #2 and #4 on their privilege log.

28 IT IS SO ORDERED.

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Dated: _____

Hon. Martin J. Jenkins
United States District Judge